KDE Recreation Bhd v Low Han Ong & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–04–4 OF 2002
ABDUL KADIR SULAIMAN, ABDUL AZIZ MOHAMMAD AND HASHIM YUSOFF JJCA
23 FEBRUARY 2006

Civil Law Act — Damages — Fatal accident — Deceased a housewife with no income — Prior to her death the household engaged a maid to assist them in the running of the daily affairs of the household — After her death husband obtained help of aged mother of deceased and an additional maid — Award for general damages — Whether the award of general damages made was manifestly excessive, unjustified and unsupported in all the circumstances of the case — Civil Law Act 1956 s 7, 7(3), 7(3A), 7(3B)

This was an action under s 7 of the Civil Law Act 1956 ('the Act') brought in the sessions court by the respondents, who are the husband and the children of the deceased. The deceased during her lifetime was a housewife earning no income. Prior to her death, the household engaged a maid to assist them in the running of the daily affairs of the household. After her death, the family obtained the help of the aged mother of the deceased and an additional maid to assist in the daily running of the household and paying the additional maid around RM700 per month as wages. In November 1996, the first respondent remarried. The respondents obtained judgment against the appellant for the negligent act and the court awarded special and general damages. As for the general damages, the court made a global award of RM100,000. The appellant's appeal to the High Court was dismissed. The issue in this appeal was whether the award of general damages made by the sessions court and subsequently affirmed by the High Court, amounting to RM100,000 was manifestly excessive, unjustified and unsupported in all the circumstances of the case.

Held, allowing the appeal:

(1) (per **Abdul Kadir Sulaiman** and **Hashim Yusoff JJCA**) The first respondent upon the death of the deceased had to employ an additional housekeeper to continue with the running of the household. It was indeed a monetary loss which has been the direct result of the negligence of the appellant. Hence, an award under this head ought to have been made in the first respondent's favour. As to the amount, since the first respondent remarried in November 1996, which was four years and two months after the death of the deceased, for the cost of hiring the additional maid, the damages to be awarded under this head would be calculated on the basis of monthly wage for the period of the deceased death to the time of remarriage, rounding up to a period of four years was just. This was so because by remarrying, the service of the deceased has been taken over by the new wife and consequently also, the service of the

additional housekeeper has become legally redundant. As for the monthly wage, a sum of RM500 per month would be fair and just. In the circumstances, the damages due to the first respondent as the spouse of the deceased would be 4 years x 12 months x RM500 which equals to RM24,000. As for the children of the marriage, no damages were awarded under this head. There would also be no award made for loss of support as such to any of the respondents because the deceased was not earning any income at the time of her death (see para 12); *Neo Kim Soon (Administrator of the Estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu & Anor* [1995] 3 MLJ 435 followed.

(2) (per **Abdul Kadir Sulaiman** and **Hashim Yusoff JJCA**) There was no evidence to support that the children of the deceased had incurred any actual quantifiable loss in money or money's worth and will continue to be incurred as a direct result of the negligence of the appellant. No award should be made in favour of the children of the deceased (see para 14).

(3) (per **Abdul Kadir Sulaiman** and **Hashim Yusoff JJCA**) Section 7(3A) of the Act makes provisions for a claim for damages for bereavement limited to RM10,000 only but sub-s (3B) thereof makes provisions for this nature of claim only for the benefit of the spouse of the person deceased. In this case, it was for the benefit of the first respondent only. No damages were allowable for the second to the seventh respondent. Accordingly, a sum of RM10,000 was awarded to the first respondent as damages for bereavement (see para 15).

(4) (per **Abdul Kadir Sulaiman** and **Hashim Yusoff JJCA**) The learned sessions court judge made a global award of RM100,000 after having exercised her so-called discretion without any basis shown. This clearly was a wrong exercise of her power and on the evidence, the amount awarded by her was manifestly excessive. Her decision cannot therefore stand. This court as the ultimate appellate court in the matter can intervene to correct the error. The appeal was allowed by substituting the amount of general damages of RM100,000 awarded by the sessions court and subsequently affirmed by the High Court, with the amount of award of RM34,000 (see paras 17–18).

(5) (per **Abdul Aziz Mohamad JCA** dissenting on quantum of award) Loss of services or society is not loss of support, and there has been no suggestion by the respondents that loss of support for a child could include loss of the services or society of its mother. The non-exclusion by paragraph (iii) of the proviso of such damages for a child did not impliedly includes such damages within the principal enactment of s 7(3) of the Act, because that would enlarge its scope. The failure of proviso (iii) to further exclude loss of services or society for a child did not results in its inclusion in the principal enactment of s 7 (3), thereby enlarging its scope. On the contrary, since the expressed scope of the principal enactment was loss of support, for such damages for a child to come within it or within s 7 so as to be capable of being awarded, it must be expressly provided. The appeal was allowed and the award was set aside to the extent of RM90,000, leaving RM10,000 as damages for bereavement for the first respondent (see paras 28–29).

[Bahasa Malaysia summary

Ini adalah tindakan di bawah s 7 Akta Undang-Undang Sivil 1956 ('Akta tersebut') yang telah dimulakan di mahkamah sesyen oleh responden-responden, yang merupakan suami dan anak-anak si mati. Si mati semasa hayatnya merupakan seorang suri rumah tanpa sebarang pendapatan. Sebelum beliau meninggal dunia, keluarga tersebut telah mengupah pembantu rumah untuk membantu mereka dalam urusan harian rumah itu. Selepas kematiannya, keluarga itu telah mendapatkan bantuan ibu si mati yang berumur dan seorang pembantu rumah tambahan dalam urusan harian rumah itu dan membayar pembantu rumah tambahan itu lebih kurang RM700 sebulan sebagai upah. Pada bulan November 1996, responden pertama telah berkahwin semula. Responden-responden telah mendapatkan penghakiman terhadap perayu kerana tindakan cuai dan mahkamah telah mengawardkan ganti rugi khas dan am. Untuk ganti rugi am, mahkamah telah memberikan award menyeluruh sejumlah RM100,000. Rayuan perayu ke Mahkamah Tinggi telah ditolak. Persoalan dalam rayuan ini adalah sama ada award untuk ganti rugi am yang diberikan oleh mahkamah sesyen dan kemudiannya disahkan oleh Mahkamah Tinggi, berjumlah RM100,000 jelas keterlaluan, tidak adil dan tidak disokong dalam semua keadaan kes itu.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Abdul Kadir Sulaiman** dan **Hashim Yusoff HHMR**) Responden pertama selepas kematian si mati telah mengupah pembantu rumah tambahan untuk meneruskan urusan kerja rumah. Ia suatu kerugian dari segi kewangan akibat langsung kecuaian perayu. Justeru itu, satu award di bawah kepala ini sepatutnya diberikan menyebelahi responden pertama. Berhubung jumlah, memandangkan responden pertama telah berkahwin dalam bulan November 1996, iaitu empat tahun dan dua bulan selepas kematian si mati, untuk kos mengupah pembantu rumah tambahan, ganti rugi yang patut diawardkan di bawah kepala ini hendaklah dikira berdasarkan upah bulanan dari masa kematian si mati hingga masa perkahwinan semula, menjadikan nombor bulat terdekat iaitu empat tahun itu adil. Ini adalah kerana dengan berkahwin semula, khidmat si mati telah diambilalih oleh isteri baru dan berikutan itu juga, khidmat pembantu rumah itu tidak diperlukan. Berhubung upah bulanan, sejumlah RM500 sebulan adalah adil. Dalam keadaan sedemikian, ganti rugi yang perlu dibayar kepada responden pertama sebagai pasangan si mati adalah 4 tahun x 12 bulan x RM500 sama dengan RM24,000. Berhubung anak-anak perkahwinan itu, tiada ganti rugi diawardkan di bawah kepala ini. Tiada juga award diberikan untuk kehilangan penyara kepada mana-mana responden tersebut kerana si mati tiada pendapatan pada masa kematiannya (lihat perenggan 12); *Neo Kim Soon (Administrator of the Estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu & Anor* [1995] 3 MLJ 435 diikut.

(2) (oleh **Abdul Kadir Sulaiman** dan **Hashim Yusoff HHMR**) Tiada keterangan untuk menyokong bahawa anak-anak si mati menanggung apa-apa kehilangan yang sebenarnya boleh dikira atau bernilai wang dan akan terus

menanggungnya akibat langsung kecuaian perayu. Tiada award patut diberikan kepada anak-anak si mati (lihat perenggan 14).

(3) (oleh **Abdul Kadir Sulaiman** dan **Hashim Yusoff HHMR**) Seksyen 7(3A) Akta tersebut menyediakan peruntukan untuk satu tuntutan ganti rugi kerana kematian terhad kepada RM10,000 sahaja tetapi sub-s (3B) memberi peruntukan untuk tuntutan bersifat sedemikian hanya untuk manfaat pasangan si mati. Dalam kes ini, ia adalah untuk manfaat responden pertama sahaja. Tiada ganti rugi boleh dibenarkan kepada responden kedua hingga ketujuh. Sewajarnya, jumlah RM10,000 diawardkan kepada responden pertama sebagai ganti rugi kerana kematian (lihat perenggan 15).

(4) (oleh **Abdul Kadir Sulaiman** dan **Hashim Yusoff HHMR**) Hakim mahkamah sesyen telah memberikan award menyeluruh RM100,000 setelah menggunakan budi bicaranya tanpa menunjukkan apa-apa asas. Ini jelas satu penggunaan kuasa yang salah di pihaknya dan atas keterangan, jumlah yang diawardkan oleh beliau jelas keterlaluan. Keputusan beliau oleh itu tidak boleh kekal. Mahkamah ini sebagai mahkamah rayuan terakhir boleh campur tangan untuk membetulkan kesilapan ini. Rayuan tersebut dibenarkan dengan menggantikan jumlah untuk ganti rugi am sebanyak RM100,000 yang diawardkan oleh mahkamah sesyen dan yang kemudiannya disahkan oleh Mahkamah Tinggi, dengan jumlah award sejumlah RM34,000 (lihat perenggan 17–18).

(5) (oleh **Abdul Aziz Mohamad HMR** menentang berhubung kuantum award) Kehilangan khidmat atau bersama-sama bukan kehilangan penyara, dan tiada cadangan oleh responden-responden bahawa kehilangan untuk seorang anak itu termasuklah kehilangan khidmat atau bersama-sama ibunya. Tak kecualian oleh perenggan (iii) kepada proviso ganti rugi sedemikian untuk seorang anak itu tidak secara tersirat terangkum dalam enakmen utama s 7(3) Akta tersebut, kerana ia akan meluaskan skopnya. Kegagalan proviso (iii) untuk seterusnya mengecualikan kehilangan khidmat atau bersama-sama untuk seorang anak itu tidak mengakibatkan ia termasuk dalam enakmen utama s 7(3), yang mana akan meluaskan skopnya. Sebaliknya, memandangkan skop yang dinyatakan dalam enakmen utama itu adalah kehilangan penyara, untuk ganti rugi sedemikian untuk seorang anak itu terangkum di bawah atau dalam s 7 agar ia boleh diawardkan, ia hendaklah jelas diperuntukkan. Rayuan tersebut dibenarkan dan award diketepikan sebanyak RM90,000, meninggalkan RM10,000 sebagai ganti rugi kerana kematian untuk responden pertama (lihat perenggan 28–29).]

Notes

For cases on damages for fatal accident under the Civil Law Act 1956, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 3668–3705.

Cases referred to

Chong Pik Sing & Anor v Ng Mun Bee & Ors [1985] 1 MLJ 433 (refd)
Hang Jong Juan v Tan Yeo Soon [1986] 2 MLJ 5 (refd)
Neo Kim Soon v Subramaniam a/l Ramanaidu & Anor [1995] 3 MLJ 435 (folld)
Ng Mun Bee & Ors v Chong Pik Sin & Anor [1987] 1 MLJ 91 (refd)

Legislation referred to
Civil Law Act 1956 ss 3(3A), 7, 7(3), 7(3A), 7(3B)

Appeal from: Civil Appeal No R3–12–43 of 1999 (High Court, Kuala Lumpur)

S Ampalagar (Anad & Noraini) for the appellants.
MV Kumar (MV Kumar) for the respondent.

Abdul Kadir Sulaiman and Hashim Yusoff JJCA:

[1] This is an action under s 7 of the Civil Law Act 1956 ('the Act') brought in the sessions court by the respondents, who are the husband and the children of a lady drowned on 23 August 1992 in a swimming pool run by the appellant. The spouse is the first respondent and the children are the second to the seventh respondents. The deceased during her lifetime was a housewife earning no income. Prior to her death, the household engaged a maid to assist them in the running of the daily affairs of the household. By her marriage to the first respondent, the deceased had six children (the second to the seventh respondents), ranging in age from four years to 18 years old. After her death, the family obtained the help of the aged mother of the deceased and an additional maid to assist in the daily running of the household and paying the additional maid around RM700 per month as wages. However, in November 1996, the first respondent, the deceased spouse, remarried. On 10 June 1993, the spouse and the six children of the deceased took out a writ in the sessions court against the appellant for negligence resulting in the death of the deceased.

[2] The respondents obtained judgment against the appellant for the negligent act and the court awarded special and general damages. As for the general damages, the court made a global award of RM100,000. The appellant appealed to the High Court against the said decision. The High Court subsequently dismissed the appellant's appeal both against liability and quantum. The appellant then brought this further appeal to us.

[3] The appeal before us limits it only to the issue as to whether the award of general damages made by the sessions court and subsequently affirmed by the High Court, amounting to RM100,000 is manifestly excessive, unjustified and unsupported in all the circumstances of the case. In other words, the liability and other consequential orders are no longer in dispute.

[4] It is the submission of the learned counsel for the appellant that as the deceased was not gainfully employed, no monetary loss was suffered by the respondents to entitle them for general damages. If at all any damages are due, it is only in respect of damages for bereavement provided by s 3(3A) of the Act to the first respondent only, amounting to RM10,000, and the cost of hiring the additional maid after her death. The other respondents being the deceased's children are not entitled to any general damages. As the deceased was not a wage earner, the respondents are not

entitled to the damages for loss of dependency under s 7 of the Act. The learned counsel for the respondents on the other hand, in supporting the decisions of the sessions court and the High Court, urged upon us not to disturb the assessment made simply for the reason that this court would consider otherwise.

[5] For the High Court, the reason for the dismissal of the appellant's appeal on general damages of RM100,000 was as what was stated by the learned judge in his judgment that:

> In an appeal against the quantum of damages, it is settled law that the appellants must establish that the award is an 'wholly erroneous estimate'…
>
> In respect of general damages, the learned judge was fully appreciative that as a consequence of the negligence of the first appellant, the respondents had lost their mother and the first respondent his wife…
>
> I accordingly dismissed the appeal with costs (in respect of both liability and quantum) in view of the fact that the trial judge was fully appraised of the evidence and concluded with a correct finding of fact….

[6] So as to ascertain whether the learned judge was correct or otherwise in his decision to dismiss the appeal, we need to scrutinize the judgment of the sessions court in awarding the sum of RM100,000 by way of general damages as this is the only issue brought before us to be resolved. As stated earlier, the liability and the quantum of special damages awarded are not in dispute before us.

[7] On the issue of general damages, this is what the learned judge of the sessions court said:

> Mengenai ganti rugi am, jumlah yang dibenarkan ialah sebanyak RM100,000. Memang diakui adalah mustahil untuk menetapkan jumlah bagi 'pain and suffering' yang dialamai oleh kesemua plaintif-plaintif yang kehilangan isteri dan ibu mereka. Berapa banyak sekali pun gantirugi yang dibenarkan tidak dapat menggantikan kasih sayang seorang isteri dan ibu. Hanya masa yang berlalu yang dapat meringankan kesedihan yang dialami. Oleh itu, ganti rugi am wajar diberi kepada pehak plaintif. Walaupun tidak ada kayu ukur (yardstick) yang boleh digunakan bagi menaksir jumlah ganti rugi, tetapi mahkamah menggunakan budi bicara dengan membenarkan jumlah RM100,000.

[8] We observe that no proper or adequate basis was given by the learned judge for awarding to the respondents the sum of RM100,000 as general damages. It was purely on the basis of exercising her discretion in the matter as there is no yardstick to work out for an exact figure. It is trite that when we talk of discretionary exercise of power, it must be based on settled legal principle, which is one of judicial discretion. It is not a personal discretion in the sense that without adhering to any settled judicial principle, a figure is given in the name of discretion purportedly exercised.

[9] Under s 7(3) of the Act, subject to the proviso, the damages which the party (the appellant in this case) who shall be liable to pay to the party for whom and for whose benefit the action is brought (in this case, the respondents) be such as will

compensate the party for whom and for whose benefit the action is brought (the respondents) for any loss of support suffered *together with any reasonable expenses incurred* as a result of the wrongful act, neglect or default of the party liable (in this case the negligent act of the appellant). (Emphasis is added.)

[10] Proviso (iii) to s 7(3) of the Act, in as far as is relevant to this case states:

> (iii) no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife.

[11] The said proviso concerns an award by way of general damages for loss of consortium because at common law, a husband could recover damages, inter alia, for the loss of the services provided by the wife. But an amendment to s 7 of the Act changed all that. In *Neo Kim Soon (Administrator of the Estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu & Anor* [1995] 3 MLJ 435, Mahadev Shankar JCA delivering the judgment of this court said at p 439 of which we associate ourselves:

> We agree with Mr Chok Chin You of counsel for the plaintiff/appellant that what has been done away with by the proviso (iii) is an award of damages, in this case to the deceased's husband, only on the ground that he has been deprived of the services or society of his wife. So far as a surviving husband is concerned, the proviso has abolished any award by way of general damages for loss of consortium. In other words, proof of the death of a wife, without more, will not entitle the surviving husband to an award in damages.
>
> It is a different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss in our view continues to be recoverable.
>
> We say this because s 7(3) as it is presently worded not only empowers the court to compensate the claimant for any 'loss of support' but also for 'any reasonable expenses incurred as a result of the wrongful act'. We cannot agree with the respondents' counsel that the word 'together' in s 7(3) must be read to mean that unless monetary loss is first shown by way of loss of support, the claim for reasonable expenses cannot be sustained.

[12] Applying that to the present case before us, the first respondent upon the death of the deceased, had to employ an additional housekeeper at the cost of about RM700 per month to continue with the running of the household on account of the death of the deceased. It is indeed a monetary loss which has been the direct result of the negligence of the appellant. Hence an award under this head ought to have been made in the first respondent's favour. As to the amount, since the first respondent remarried in November 1996, which was four years and two months after the death of the deceased on 23 August 1992, we think for the cost of hiring the additional maid, the damages to be awarded under this head would be calculated on the basis of monthly wage for the period of the deceased death to the time of remarriage which in our view, rounding up to a period of four years is just. This is so because by remarrying, the service of the deceased has been taken over by the new wife and consequently also, the service of the additional housekeeper has become legally redundant. As for the monthly wage we would consider a sum of RM500 per month would be fair and just. In the circumstances, the damages due to the first

respondent as the spouse of the deceased would be 4 years x 12 months x RM500 which equals to RM24,000. As for the children of the marriage, ie the second to the seventh respondents, no damages are awarded under this head. There would also be no award made for loss of support as such to any of the respondents because the deceased was not earning any income at the time of her death.

[13] By way of obiter dictum, Mahadev Shanker JCA in *Neo Kim Soon*, at p 440 said:

> As a matter of interest, we observe that proviso (iii) does not preclude damages to a child for having been deprived of the services or society of his mother but we do not think that it is necessary for this appeal to say anything more about this except that it follows from what we have said that wherever it can be shown whether by a parent, a surviving spouse or a child that actual quantifiable loss has been incurred in money or money's worth and will continue to be incurred as a direct result of the negligence of the wrongdoer, such loss will be recoverable even if there was no direct financial contribution made by the deceased to or on behalf of the person for whose benefit the action was brought.

[14] On our part, we share the same view as expressed. However, in our case, there is no evidence to support that the children of the marriage, ie the second to the seventh respondents, had incurred any actual quantifiable loss in money or money's worth and will continue to be incurred as a direct result of the negligence of the appellant. For that reason, no award should be made in favour of the said respondents in this action. No doubt each one suffered bereavement for the tragic loss of their mother. However, as will be seen later, under this head only the first respondent would benefit.

[15] Section 7(3A) of the Act also makes provisions for a claim for damages for bereavement limited to RM10,000 only but sub-s (3B) thereof makes provisions for this nature of claim only for the benefit of, in relation to this appeal, the spouse of the person deceased. In this case, it is for the benefit of the first respondent only. No damages are allowable for the second to the seventh respondent under this head. Accordingly, a sum of RM10,000 is awarded to the first respondent as damages for bereavement.

[16] Consequently, upon the death of the deceased, the appellant is liable to the first respondent only as follows:

(a) for the cost of hiring an additional maid to replace the services rendered by the deceased to the extent of RM24,000 at the rate of RM500pm for four years; and

(b) damages for bereavement to the extent of RM10,000; making a total of RM34,000 in all.

[17] The learned sessions court judge made a global award of RM100,000 after having exercised her so-called discretion without any basis shown. This clearly is a wrong exercise of her power and on the evidence the amount awarded by her is manifestly excessive. Her decision cannot therefore stand. This court as the ultimate appellate court in the matter can intervene to correct the error. In *Hang Jong Juan v*

Tan Yeo Soon [1986] 2 MLJ 5, it was held that in an appeal against the quantum of damages, it is settled law that the onus on the appellant is a heavy one and it must establish plainly that the trial judge's award was a wholly erroneous estimate. Indeed, by the evidence produced in our present case, the appellant has succeeded in the discharge of the onus. The learned judge of the High Court similarly has committed an error in law when he affirmed the decision of the sessions court on this issue of general damages by saying:

> In respect of general damages, learned judge was fully appreciative that as a consequence of the negligence of the first appellant, the respondent had lost their mother and the first respondent his wife.

when the evidence available does not support the giving of so much award by way of general damages by the learned judge of the sessions court.

[18] In the circumstances, the appeal is allowed by substituting the amount of general damages of RM100,000 awarded by the sessions court and subsequently affirmed by the High Court, with the amount of award of RM34,000 as mentioned above with costs to the appellant. Deposits to be refunded to the appellant.

[19] Our learned brother, Abdul Aziz Mohammad JCA, having read this draft, has written a separate judgment agreeing with us as to the award to the first respondent of RM10,000, being damages for bereavement but disagreeing with us as to the additional award of RM24,000 to the first respondent being the cost of hiring an additional maid for four years at RM500 per month to replace the services rendered by the deceased prior to the remarriage of the first respondent in November 1996.

Abdul Aziz Mohammad JCA:

[20] This was a claim for damages under s 7 of the Act. The dispute in this appeal is over the award of general damages for the respondents in the sum of RM100,000. In the sessions court, the respondents had claimed RM190,000 as general damages, the sum being apportioned as follows: RM50,000 for the first respondent, the husband of the deceased, and, for the second to the seventh respondents, the children of the deceased, RM30,000, RM20,000, RM20,000, RM20,000, RM20,000 and RM30,000 respectively. The sessions court judge awarded RM100,000 without apportioning it. It is apparent from the penultimate paragraph of her grounds of judgment that she intended the sum to be compensation for the pain and suffering caused to the respondents by the loss of their wife and mother. The award was upheld by the High Court on appeal.

[21] In this appeal, the respondents' only contention is that they are entitled to damages for loss of the services or society of the deceased and they seek to justify the award on that basis.

[22] According to subs-s (3) of s 7, the damages that may be awarded under the section shall be such as will compensate the wife, husband, parent and child of the

deceased person 'for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default' that caused the death of the deceased person. The subsection has a proviso in four paragraphs. By paragraph (iiii):

> no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife.

[23] It is clear from the express provision of the second limb of paragraph (iii) that the first respondent is not entitled to damages for loss of the services or society of his wife. The question is whether the other respondents, the children, are entitled to damages for loss of the services or society of their mother.

[24] The respondents cited one case in which children were awarded damages for loss of the services of their mother, namely, *Ng Mun Bee & Ors v Chong Pik Sin & Anor* [1987] 1 MLJ 91, in which three children were awarded compensation for loss of the services of their mother, but, going only by the judgment of the High Court, that case is inapplicable to the present case because the claim for damages in that case is said at p 91A–B (right) not to be one under s 7, There was no appeal against that finding, except as regards quantum. See *Chong Pik Sing & Anor v Ng Mun Bee & Ors* [1985] 1 MLJ 433, at p 434 bottom left. Going by the Supreme Court's judgment (reported two years earlier than the High Court's), it would appear from p 434 B (right) that the action was in fact brought under s 7. Nevertheless, the case is still inapplicable to the present case, because it is apparent from p 434C–D that the action was brought under the previous subs-s (3), which read:

> In every such action the court may give such damages as it thinks fit proportioned to the loss resulting from the death to the parties respectively for whom and for whose benefit the action is brought…

The key words were 'loss resulting from the death', where 'loss' was not confined, whereas the present subs-s (3) confines loss to 'loss of support'.

[25] Of the cases that they cited in their skeletal submission, the respondents placed foremost reliance on *Neo Kim Soon v Subramaniam a/l Ramanaidu & Anor* [1995] 3 MLJ 435, where this court held that the husband of the deceased woman was entitled to recover the expenses of employing a housekeeper that had to be employed to look after their infant son as a result of the death of his mother. This court treated the expenses as falling within the words 'any reasonable expenses incurred as a result of the wrongful act' in subs-s (3) (see p 439G–H). But it is not on that decision that the respondents rely. They are not claiming the expenses incurred in employing someone to look after the children under the 'reasonable expenses incurred' limb of subs-s (3). They are claiming damages for loss of the services or society of the deceased and they rely on the following observations of Mahadev Shanker JCA at p 440C:

> As a matter of interest, we observe that proviso (iii) does not preclude damages to a child for having been deprived of the services or society of his mother but we do not think that it is necessary for this appeal to say anything more about this…

[26] The learned High Court judge, in paragraph 7 of his grounds of judgment, referred to those observations but it is not clear whether he upheld the award of general damages on the strength of those observations, on the basis that the damages were for loss of services or society, because in paragraph 8 he seems to agree with the sessions court judge that the damages were for pain and suffering caused to the respondents, which, of course, are not claimable under s 7, except as to bereavement under sub-s (3A), which is limited to RM10,000 and which, according to sub-s (3B), shall only be for the benefit of the spouse.

[27] I do not think that the observations of Mahadev Shanker JCA, aside from their being about a question that did not arise for decision, should be construed as a finding by this court that damages may be awarded to a child under s 7 for loss of the services or society of its mother. The thing that was observed was what paragraph (iii) of the proviso does not expressly do. If 'preclude', the word used in the passage, were taken to mean 'exclude', it is true that paragraph (iii) does not exclude such damages for a child. The paragraph only excludes such damages for a husband. But does the non-inclusion of such damages for a child mean that they are included, that is, included not in paragraph (iii) — which cannot be, because it is an exclusionary paragraph — but included in the principal enactment of subs-s (3)? I read Mahadev Shanker JCA's saying 'but we do not think that it is necessary for this appeal to say anything more about this' to mean that more thinking needed to go into the question. Even if the dictum could be construed as indicating a thinking that a child could be awarded such damages, I think it was merely a tentative thinking.

[28] I am of opinion that the question has to be decided by going back to the principal enactment of subs-s (3), which is that part of it that comes before the proviso and which lays down that the damages that may be awarded under the subsection are damages 'for any loss of support'. Loss of services or society is not loss of support, and there has been no suggestion by learned counsel for the respondents that loss of support for a child could include loss of the services or society of its mother. I do not think that the non-exclusion by paragraph (iii) of the proviso of such damages for a child impliedly includes such damages within the principal enactment of subs-s (3), because that would enlarge its scope. Since the principal enactment is confined to loss of support (besides reasonable expenses) I do not comprehend why proviso (iii) needs to exclude damages for loss of services or society, something that is not included in the principal enactment in the first place. But whatever the reason may be, I do not think that the failure of proviso (iii) to further exclude loss of services or society for a child results in its inclusion in the principal enactment of subs-s (3), thereby enlarging its scope. On the contrary, since the expressed scope of the principal enactment is loss of support, for such damages for a child to come within it or within s 7 so as to be capable of being awarded, it must be expressly provided.

[29] I would, therefore, allow the appeal with costs and set aside the award to the extent of RM90,000, leaving RM10,000 as damages for bereavement for the first respondent, which have been conceded.

Appeal allowed.

Reported by Peter Ling